

124 FERC ¶ 61,224  
UNITED STATES OF AMERICA  
FEDERAL ENERGY REGULATORY COMMISSION

Before Commissioners: Joseph T. Kelliher, Chairman;  
Sudeen G. Kelly, Marc Spitzer,  
Philip D. Moeller, and Jon Wellinghoff.

Energy Transfer Partners L.P., et al.

Docket No. IN06-3-006

ORDER ON REHEARING

(Issued September 4, 2008)

1. This order addresses Energy Transfer Partners, L.P.'s (ETP) request for rehearing of the Commission's May 8, 2008 Order Granting Subpoena in Part and Denying Subpoena in Part.<sup>1</sup>

**Background**

2. This proceeding began on July 26, 2007, when the Commission issued an order<sup>2</sup> directing ETP to show cause why it should not be found to have violated the code of conduct applicable to persons holding blanket marketing certificates<sup>3</sup> by allegedly manipulating wholesale gas prices at the Houston Ship Channel (HSC) by suppressing them to benefit ETP's financial positions and other physical positions for the period from December 2003 through December 2005.<sup>4</sup> On October 9, 2007, ETP filed an application

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<sup>1</sup> *Energy Transfer Partners, L.P.*, 123 FERC ¶ 61,136 (2008) (May 8 Order).

<sup>2</sup> *Energy Transfer Partners, L.P.*, 120 FERC ¶ 61,086 (2007) (Show Cause Order), *order on reh'g*, 121 FERC ¶ 61,282 (2007).

<sup>3</sup> 18 C.F.R. § 284.403(a) (2005).

<sup>4</sup> On May 15, 2008, the Commission issued an order establishing a hearing to address the charges of manipulation against ETP as well as allegations that ETP's affiliate, Oasis Pipeline, L.P. violated certain Commission regulations governing service pursuant to the Natural Gas Policy Act of 1978. *Energy Transfer Partners, L.P.*, 123 FERC ¶ 61,168 (2008).

for the issuance of a subpoena to McGraw-Hill. The subpoena request sought data and information concerning the compilation of *Inside FERC*<sup>5</sup> gas price indices, which ETP contended went to the core of the allegations asserted against ETP in the Show Cause Order. On October 30, 2007, McGraw-Hill filed an answer in opposition to ETP's application for subpoena. On November 14, ETP filed an answer in opposition to the opposition of McGraw-Hill reiterating that the Commission should issue the requested subpoena. On December 11, 2007, McGraw-Hill filed a motion in response to ETP's November 14, 2007 pleading. McGraw-Hill asserted that ETP made arguments about the newsgathering privilege that were incorrect and requested that the Commission decline to issue the subpoena sought by ETP. On February 21, 2008, ETP renewed its application for issuance of a subpoena to McGraw-Hill with certain modifications. On February 27, 2008, McGraw-Hill filed a pleading in opposition to ETP's renewed application for issuance of a subpoena to McGraw-Hill.

3. Item 1.2 of ETP's subpoena requested that McGraw-Hill produce all trade data reported to McGraw-Hill or Platts that were not used to develop any index price as ultimately published in *Inside FERC*<sup>6</sup> for the period from November 2003 through December 2005 (inclusive) for the following South Texas trading points: HSC; Natural Gas Pipeline Co.-South Texas (NGPL-STX); Tennessee Gas Pipeline Co.-Zone 0 (TGP Z0); Texas Eastern Transmission Corp.-South Texas (TETCO-STX); and Katy.

4. ETP requested that McGraw-Hill produce certain information with respect to the following eleven trading points: ANR Pipeline Co.-Oklahoma; Centerpoint Energy Gas Transmission-East; Columbia Gulf Mainline; El Paso Natural Gas Co.-Permian Basin; El Paso Natural Gas Co.-San Juan Basin; Natural Gas Pipeline Co.-Mid-Continent; Northwest Pipeline Corp.-Rockies; Panhandle Eastern Pipeline Corp.-TX/OK; Southern California Gas Co.; Transwestern Pipeline Co.-Permian Basin; and Waha. In Item 1.5, ETP requested that McGraw-Hill produce all trade data reported to McGraw-Hill or Platts that were used to calculate the index price as ultimately published in *Inside FERC* for the period from August 2005 through December 2005 (inclusive) for the eleven trading points. In Item 1.6, ETP requested that McGraw-Hill produce all trade data reported to McGraw-Hill or Platts that were not used to develop any index price as ultimately published in *Inside FERC* for the period from August 2005 through December 2005 (inclusive) for the eleven trading points. In Item 1.7, ETP requested that McGraw-

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<sup>5</sup> *Inside FERC's Gas Market Report (Inside FERC)* is a monthly publication containing indices for the market price of natural gas at various trading locations that is published by Platts, a division of McGraw-Hill.

<sup>6</sup>Information received but not used to compile the indices is referred to as "outlier data."

Hill produce all documents reflecting or related to any formulas or methodologies relied upon in developing the index prices (including all documents reflecting or related to any decision to exclude any data or information from consideration in developing the index prices) for the period from August 2005 through December 2005 (inclusive) for the eleven trading points. In Item 1.10, ETP requested that McGraw-Hill produce all documents reflecting or related to the identity of any person responsible, in whole or in part, for developing the price index published in *Inside FERC*, during the relevant period, for the South Texas trading points and the eleven other trading points.

5. On May 8, 2008, the Commission issued an Order Granting Subpoena in Part and Denying Subpoena in Part.<sup>7</sup> As pertinent here, the Commission granted ETP's request in Item 1.2 for outlier data for HSC, but denied the request for the four other South Texas trading points. The Commission denied ETP's requests in Items 1.5, 1.6 and 1.7 that McGraw-Hill produce certain information with respect to the eleven trading points. The Commission also granted the request in Item 1.10 for the South Texas trading points but not for the eleven other trading points. Based on its analysis of ETP's subpoena request under the standards set forth by the courts in determining when a reporter or news gatherer, such as McGraw-Hill, is protected from a request to disclose information, the Commission determined that ETP had not shown that it had a need for the information and that it had exhausted all reasonably available alternative sources.

6. On June 9, 2008, ETP filed a request for rehearing of the Commission's May 8, 2008 Order.

7. On June 25, 2008, McGraw-Hill filed a response in opposition to ETP's request for rehearing.

### **ETP's Request for Rehearing**

8. ETP states that the Commission granted its request for outlier data not used to set the HSC index, primarily on the basis that ETP had already been provided with the HSC outlier data in receiving a copy of Platts' response to Enforcement Litigation Staff's subpoena for HSC data. As an initial matter, ETP states that it cannot be certain if any outlier data was provided for HSC because Platts' responses do not include such data or state whether any such data exists for HSC. To the extent that the Commission assumed such data was provided for HSC, and it was not, ETP requests that the Commission clarify that McGraw-Hill must either (1) produce such data for HSC for each month, or (2) if no such data exists for HSC, state that no data exists for each month for HSC.

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<sup>7</sup> *Energy Transfer Partners, L.P.*, 123 FERC ¶ 61,136 (2008).

9. ETP asserts that the Commission should reverse its decision denying the production of data received but not used to calculate the indices at the other South Texas points. ETP argues that such data is necessary to rebut the “decoupling” allegation that prices at HSC decoupled from nearby South Texas points. ETP states that it does not know what data Platts received for the benchmark South Texas points to compile its indices. ETP contends that if McGraw-Hill received sales data related to the other South Texas points, but failed to include those trades in the respective benchmark indices, that information could explain why the indices allegedly “decoupled” or why the decoupling allegations are unsustainable.

10. ETP asserts that Enforcement Litigation Staff goes beyond claiming that the HSC index decoupled from the indices at the nearby South Texas points. ETP contends that Enforcement Litigation Staff makes claims that bear directly on comparing individual sales data from the nearby South Texas points - not just data included by Platts in the respective index for that location. For example, ETP states that in its February 14, 2008 Reply Brief (at p. 11), Enforcement Litigation Staff asserts that “[a]useful measure of ETP’s suppression of price at HSC is the *price behavior* at nearby trading points in south and east Texas.” (Emphasis added). ETP argues that this claim is similar to several allegations in the Show Cause Order. *See, e.g.,* Show Cause Order at P 62 (asserting that “the hurricane did not cause the low prices at HSC relative to nearby south Texas points. *Had the hurricane been responsible for the price drop observed starting at 2:10 p.m. on September 28, 2005 at HSC, prices at nearby south Texas points would also have been affected.*”) (emphasis added). ETP asserts that the Show Cause Order even asserts that ETP’s trading at HSC on September 28, 2005 prevented the prices for “fixed price gas at HSC from running up along with the NYMEX *and with other nearby South Texas Points.*” *Id.* at P 49 (emphasis added).

11. ETP states that Enforcement Staff’s April 25, 2008 Motion for Leave to Answer and Answer to ETP’s Reply Brief goes even further, alleging (at p. 24) that trading at other nearby South Texas points “that preceded ETP’s first fixed price transaction at HSC must be included to measure relative price declines at HSC because, having occurred earlier, they were not influenced by ETP’s price suppression at HSC. As gas from South Texas represents a significant percentage of HSC supplies, it is reasonable that prices occurring after ETP began trading at HSC could have been influenced by ETP’s lower priced sales. Hence, these transactions that occurred prior to ETP’s sales are a useful benchmark against which to compare ETP’s market activity.”

12. ETP argues that all of these allegations make a comparison of individual sales at HSC to individual sales at the nearby South Texas locations, and the timing of those individual sales, highly relevant. ETP contends that these individual sales, whether or not used by Platts in the respective indices, are especially important because Enforcement Litigation Staff offers no evidence whatsoever regarding what the prices of fixed-priced sales were at other nearby South Texas points on September 28, 2005 or on any other

days in the allegation months. ETP argues that to the extent that such sales were reported to Platts concerning the nearby South Texas locations, Platts alone possesses that data.

13. ETP states that it also sought data from eleven trading points that bear directly on the claims Enforcement Litigation Staff makes in the post-hurricane period from August 2005 to December 2005. ETP asserts that its requests are highly relevant to ETP's defense, including establishing the magnitude of the post-hurricane price separations between locations east and west of the Sabine River and rebutting Enforcement Litigation Staff's accusations that the basis at HSC should have remained aligned with NYMEX. ETP contends that these data are not available from any other source and go to the heart of Enforcement Staff's primary allegations in its most significant months of alleged manipulation - those following the hurricanes in 2005.

14. ETP asserts that its requests are narrowly focused to regions that have specific relevance to this case. ETP argues that "[a]fter hurricanes Katrina and Rita, U.S. natural gas prices separated between East and West, with the most striking difference along the Sabine River boundary between Texas and Louisiana," Kalt/Morris Aff. ¶¶ 149 (Oct. 9, 2007) and that the Commission has noted as much in its 2006 State of the Markets Report.<sup>8</sup>

15. ETP argues that

[i]f manipulation occurred, the price impact of any manipulation should have been concentrated at the time of the manipulation and then dissipate. Hence, if manipulation had been the dominant force affecting basis relationships in late September 2005, one would expect basis levels to return to their pre-September levels in the succeeding weeks and months. They did not. *This is true not just of HSC, but of other commercially important locations, including Permian, SoCal, and Waha.* The persistently weak basis post-Rita is consistent with the hypothesis that the impact of the storm on the Henry Hub NYMEX delivery point, and hence the NYMEX futures prices, affected basis relationships. Pirrong Aff. ¶ 51 (Oct. 9, 2007) (emphasis added).

16. ETP also asserts that market activity in the producing areas such as Waha and the San Juan and Permian basins, as well as at delivery locations (Southern California Gas Co.) and competing locations (e.g., Northwest Pipeline Corp.- Rockies) are more relevant than NYMEX (Henry Hub) to understanding what happened to prices on the west side of

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<sup>8</sup> ETP's Request for rehearing at 8, footnote 5.

the Sabine River during the post-hurricane bid weeks.<sup>9</sup> Furthermore, it contends that aggregate Platts data from ANR Pipeline Co.-Oklahoma, Centerpoint Energy Gas Transmission- East, Natural Gas Pipeline Co.-Mid-Continent, and Panhandle Eastern Pipeline Corp.-TX/OK all indicate wide differences between fixed-price sales at those locations and physical basis sales at those same locations. ETP submits that this fact indicates that other points, not just HSC, were impacted by the hurricanes in terms of basis prices “decoupling” from fixed-price sales.

17. ETP contends that the data requested thus relate to whether, in the post-hurricane periods, the basis to NYMEX was representative of the prices of fixed-price trades at locations west of the Sabine River. ETP assert that this evidence goes beyond ETP’s expert witnesses’ use of public data to disprove the validity of the “implied price” theory. Rather, ETP argues that the requested data directly relate to disproving Enforcement Litigation Staff’s theory that fixed-price sales at HSC should have remained aligned with the expected basis differential to NYMEX in the post hurricane periods. ETP submits that the publicly available data from Platts, however, show only aggregate volumes, not individual trades transacted during bidweek. ETP asserts that the day of bidweek makes a difference, and those data are only available from Platts.

### **McGraw-Hill’s Answer**

18. McGraw-Hill asserts that ETP’s request for rehearing fails to add anything more to its insufficient prior attempt to make the required showing and also fails to identify any error in the Commission’s analysis. McGraw-Hill argues that ETP ignores the controlling precedent and simply repeats its unreasonable demand for McGraw-Hill’s privileged and confidential newsgathering materials despite the fact that the materials sought are wholly unrelated to the heart of this matter and are available from other sources.

19. McGraw-Hill asserts that with respect to Item 1.2, ETP already has what it is asking for. McGraw-Hill submits that in order to comply with a portion of the May 8 Order, it produced a set of spreadsheets associated with each of the five South Texas points for the relevant period. McGraw-Hill states that each spreadsheet generally reflects all of the data reported to Platts for a particular pricing point for a particular

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<sup>9</sup> ETP’s experts used Waha to compare to prices at HSC “because it is the source of natural gas flowing east across Texas.” Kalt/Morris Aff. ¶ 144 (Oct. 9, 2007). Furthermore, “[g]as produced or marketed in Waha competes with gas produced in the Rocky Mountains to serve markets in California and the Midwest.” *Id.* ¶ 352. Columbia Gulf Mainline was used as a proxy for daily prices at Henry Hub during the October 2005 bidweek, and thus it was selected as a location comparable to Henry Hub.

month, including trades that were determined to be “outliers” and data that may have been excluded from the statistical analyses underlying the published prices for any other reason. McGraw-Hill contends that to the extent ETP means to press this request beyond such records, and to demand license to rifle through all submissions to McGraw-Hill ever collected from any of its confidential sources in order to compare those submissions to the data reflected on the spreadsheets, the request clearly cannot withstand First Amendment scrutiny.

20. McGraw-Hill asserts that with respect to the information sought for eleven other trading points in Items 1.5, 1.6, 1.7 and 1.10, ETP cannot overcome the reporter’s privilege. McGraw-Hill argues that ETP offers nothing more than the conclusory argument that it needs the data to “determine what sales comprised such indexes and on what day of the week such sales were consummated.” ETP Rehearing at 9 fn 7. McGraw-Hill contends that this vague, non-specific assertion of need amounts to nothing more than a hunch that the materials sought might contain useful information is simply not enough to pierce the reporter’s privilege. *See CFTC v. McGraw-Hill*, 507 F. Supp. 2d at 50 (“mere speculation that information might be useful” is inadequate to set aside the privilege).

21. McGraw-Hill argues that since Enforcement Litigation Staff does not even mention any of the eleven other trading points in the Show Cause Order, the data underlying Platts assessments for these particular hubs are clearly not specifically required to rebut Enforcement Litigation Staff’s case. McGraw-Hill asserts that the reality is that the individual deals underlying the Platts assessments at the eleven other points are not even central to the so-called “de-coupling” defense for which ETP says it seeks them. McGraw-Hill contends that this proposed defense speaks to the general relationship between basis prices and fixed prices in the natural gas market, but not on anything particular to the data Platts gathered for these eleven other points. Thus, McGraw-Hill asserts that ETP is incorrect when it asserts that data in support of its argument is “only available from Platts;” rather, this decoupling argument can be made by reference to any collection of market data for the eleven other points and ETP can get that data from the trading platforms which host such actual fixed price and basis trades, such as the Intercontinental Exchange (ICE). Indeed, McGraw-Hill contends that data obtained from ICE may even be better suited to this purpose as it would presumably be time stamped and indicate both sides to a transaction. Accordingly, McGraw-Hill concludes that ETP has provided no basis whatsoever for rehearing of the Commission’s denial of ETP’s Items 1.5, 1.6 and 1.7.

**July 15, 2008 Order Directing Answer and Related Pleadings**

22. On July 15, 2008, the Commission issued an order directing ETP to respond to two points raised by McGraw-Hill in its answer.<sup>10</sup> ETP was directed to file an answer responding to the following:

1. At pages 4-5 of McGraw-Hill's June 25, 2008 response, McGraw-Hill asserts that, pursuant to the May 8, 2008 subpoena order, ETP already has the information sought by Item 1.2 of ETP's subpoena request. Please confirm McGraw-Hill's assertion or provide a detailed explanation of what information requested by Item 1.2 has not been provided.

2. At pages 7-8 of McGraw-Hill's June 25, 2008 response, McGraw-Hill asserts that the information sought by Item 1.5, 1.6, and 1.7 of ETP's subpoena request is available from other sources. Specifically, McGraw-Hill argues that data to support ETP's decoupling defense "can be made by reference to any collection of market data for the Eleven Other Hubs and ETP can get that data from trading platforms which host such actual fixed price and basis trades, such as the Intercontinental Exchange ("ICE")." Please provide a detailed response to this assertion.

23. On July 25, 2008, ETP filed an answer supplementing its rehearing request in response to the July 15, 2008 Order. With respect to spreadsheets submitted by McGraw-Hill in response to Item 1.2, ETP asserts that although it is clear that they provide some of the information that ETP is seeking in Item 1.2, it is not clear that they provide all the relevant information. ETP contends that the spreadsheets were produced as hard copy printouts only. ETP submits that a printed spreadsheet may not include all of the fields or actual data included in the electronic version of the spreadsheets. ETP also argues that McGraw-Hill's statements that the spreadsheets generally reflect the data ETP is seeking suggest that there might be other outlier or excluded data that is not reflected on these spreadsheets. ETP contends that the Commission should order McGraw-Hill to produce the spreadsheets in electronic format, as well as any other data it possesses that is responsive to Item 1.2. ETP states that if McGraw-Hill has already produced all outlier data and other data not used for developing a given index, and if all such data are reflected on the spreadsheets, ETP requests that McGraw-Hill confirm, for each month's report, whether the report contains all such data.

24. With respect to the information requested for the eleven other hubs, ETP asserts that McGraw-Hill's assertion that this information is publicly available is incorrect

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<sup>10</sup> *Energy Transfer Partners, L.P.*, 124 FERC ¶ 61,032 (2008).



because data from such public sources such as ICE represent only a small fraction of the total deals reported to Platts. ETP also contends that another reason it needs the information from McGraw-Hill relates to the fact that the specific day on which a trade is made during bidweek is relevant to the case. ETP submits that the publicly available data do not show the range of bidweek trading days compared to the days reflected in the trades reported to Platts. For example, ETP states that if one compares publicly available data from ICE to the Platts reports that have already been produced for the South Texas locations, it becomes clear that there are numerous bidweek days where no trading occurred on ICE, although trades were reported to Platts for such days. ETP concludes that the data it is seeking is relevant for ETP to analyze the true picture of the days on which trades took place and is not available from any other source other than McGraw-Hill.

25. On August 1, 2008, McGraw-Hill filed a response to ETP's answer supplementing its rehearing request. McGraw-Hill states that the fixed-price physical and NYMEX physical basis bidweek trade data reported to and considered by the Platts editor responsible for determining the published indices will be reflected on the spreadsheets McGraw-Hill has produced. McGraw-Hill asserts that the fact that ETP might not fully understand how to read McGraw-Hill's documents is irrelevant. McGraw-Hill argues that the May 8 Order only requires it to provide documents not to explain ETP how to read those documents or what they mean. McGraw-Hill contends that ETP's assertion that it needs an electronic version of the documents already produced to determine formulas used or which data was excluded is non-responsive to the Commission's inquiry. McGraw-Hill contends that there is no basis for ETP's assertion that McGraw-Hill hid "fields" or "tabs" of data that may have contained responsive information. McGraw-Hill submits that it did not intentionally omit any fields or tabs that contained data reported (whether used or not) for the relevant hubs during the relevant time period.

26. With respect to the information for the eleven other hubs, McGraw-Hill asserts that the defense ETP intends to make from data underlying the eleven other hubs is not specific to Platt's index prices. McGraw-Hill argues that this defense aims to show that there are any number of reasons why historically observed price differentials between two pricing points might decouple and to demonstrate the flaws, in general, with the Commission's implied price theory. McGraw-Hill submits that since these arguments do not depend on anything specific to the Platt's indices, the trade data needed can be obtained from other sources. McGraw-Hill asserts that ETP argues that it needs the Platts data because Platts has already gone to the trouble of collecting it. McGraw-Hill argues that ETP's assertion that it needs to get the data from Platts because publicly available data from ICE represents only a small fraction of the total deals reported to Platts leaves out a critical point: ICE is not the only potential source of such data. McGraw-Hill contends that if ETP thinks it needs more data than ICE has, it can subpoena voice brokers and individual trading companies in order to assemble its own collection of such data. Similarly, McGraw-Hill submits that if the need is for more detail on the trades,

such as date, or time of day, that information can be sought from these alternative sources by subpoena. McGraw-Hill concludes that since the information needed for this argument is clearly available from other sources, the reporter's privilege requires that ETP turn to those sources.

27. On August 5, 2008, ETP filed a letter in response to McGraw-Hill. With respect to Item 1.2, ETP states that it is satisfied with McGraw-Hill's explanation that there is only a remote possibility that some reported data may not have been recorded in the spreadsheets already produced, and that any such data that may exist would not have been systematically saved in a manner that would make it retrievable. ETP submits that in light of this explanation, it does not believe it is necessary for the Commission to revisit this aspect of the subpoena application. ETP continues to contend, however, that McGraw-Hill should produce any electronic version it possesses of the spreadsheets.

28. With respect to the information concerning the eleven other hubs, ETP continues to maintain that such information is central to its defense. ETP states that McGraw-Hill essentially concedes in its response that the task of attempting to compile data comparable to that which McGraw-Hill possesses would require extensive and extremely burdensome third-party discovery, including from voice brokers and individual trading companies throughout the country. ETP argues that the information is highly specific in nature and it has provided a detailed explanation of its relevance.

### **Discussion**

29. As previously discussed in the May 8 Order, in *Commodity Futures Trading Commission v. The McGraw-Hill Companies, Inc.*,<sup>11</sup> the court described the legal standard for the reporter's privilege as follows:

Whether the privilege prevails in a given case is determined by a balancing test. (Citation omitted). The balancing test requires evaluation of two factors: (1) the need for the information and (2) whether the party seeking the information has exhausted all reasonably available alternative sources. *Zerilli*, 656 F.2d at 713-14. If the requested information is crucial to a party's case, the balance of interests favors disclosure. *Id.*; *Carey*, 492 F.2d at 637, 160 U.S. App. D.C. 365 (overriding the privilege when the information goes to "the heart of the matter"). But a party must produce more than "[m]ere speculation that information might be useful . . . [it] must describe the information [it] hope[s] to obtain and its importance to [its] case with a reasonable degree of specificity." *Black Panther*

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<sup>11</sup>507 F. Supp. 2d 45 (D.D.C. 2007) (*CFTC v. McGraw-Hill*).

*Party v. Smith*, 213 U.S. App. D.C. 67, 661 F.2d 1243, 1268 (D.C. Cir. 1981)), *cert. granted and vacated as moot*, 458 U.S. 1118, 102 S. Ct. 3505, 73 L. Ed. 2d 1381 (1982).<sup>12</sup>

30. ETP sought rehearing of the May 8 Order arguing that the Commission erred by only requiring production of outlier data for HSC and failing to require McGraw-Hill to produce outlier data for the four other South Texas points. ETP also asserted that it was not sure whether all the outlier data was provided by McGraw-Hill because of the format of the information. McGraw-Hill filed an answer stating that it already provided hard copies of spreadsheets of information for the South Texas points including outlier data. In response to the July 15 Order directing an answer, ETP argued that although it had hard copies of the spreadsheets, it was concerned that the hard copies did not reflect all the data that McGraw-Hill had and that certain information in the electronic copies may not be reflected in the hard copies. McGraw-Hill answered that the hard copies reflected all the information it possesses and that were considered by its editors in compiling index prices. Finally, ETP indicated that it was satisfied with McGraw-Hill's explanation but still requested electronic versions of the spreadsheets.

31. The Commission finds that since McGraw-Hill has provided ETP with the outlier data for all the South Texas points sought by Item 1.2 of ETP's subpoena request and ETP has found that acceptable, ETP's request for rehearing of the Commission's May 8 Order is moot in this respect. ETP does, however, request electronic versions of the spreadsheets already provided. The Commission denies this request. McGraw-Hill has represented that it has provided all the information sought pursuant to Item 1.2 for the South Texas points and that it did not omit any fields or tabs of data that may have contained responsive information.<sup>13</sup>

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<sup>12</sup>507 F. Supp. 2d 45, 49 (D.D.C. 2007).

<sup>13</sup> See McGraw-Hill's August 1, 2008 at 6, fn 8. Moreover, McGraw-Hill argues that, contrary to ETP's assertion, an electronic version is not needed to determine formulas or which data was excluded because anyone with a calculator can figure out the simple formulas reflected on the spreadsheets or which data was not used in those formulas.

32. In *McNally Tunneling Corp. v. City of Evanston*,<sup>14</sup> the United States District Court for the Northern District of Illinois, Eastern Division stated that:

This Court's own research has uncovered an apparent split of authority on whether a party is entitled to both hard-copy and electronic versions of computer files. Compare *Williams v. Owens-Illinois, Inc.*, 665 F.2d 918, 932-33 (9th Cir. 1982) (district court did not abuse its discretion in denying request for computer tapes where party already had all information from tapes on wage cards) with *Anti-Monopoly v. Hasbro*, 1995 U.S. Dist. LEXIS 16355, No. 94 CIV. 2120, 1995 WL 649934, at \*2 (S.D. N.Y. Nov. 3, 1995) ("Production of information in 'hard copy' documentary form does not preclude a party from receiving that same information in computerized/electronic form.").

The court denied the motion for an electronic version of certain schedules and cost summaries. The court found that the petitioners did not explain why the hard-copy versions of the computerized schedules and cost information were insufficient. Similarly, here ETP has not explained why the information McGraw-Hill has provided on the hard copy versions of the spreadsheets is insufficient to prepare ETP's defense. This is especially true in light of McGraw-Hill's statement that there is no missing information in the spreadsheets and assertion that the formulas can be calculated based upon the hard copy versions.

33. The Commission grants ETP's request for rehearing and directs McGraw-Hill to comply with Items 1.5, 1.6, 1.7 and 1.10 of ETP's subpoena request. ETP has shown that the requested data directly relate to its attempt to disprove Enforcement Litigation Staff's theory that fixed-price sales at HSC should have remained aligned with the expected basis differential to NYMEX in the post hurricane periods. ETP has established that the publicly available data from Platts show only aggregate volumes, not individual trades transacted during bidweek, and that the day of bidweek may make a difference.<sup>15</sup>

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<sup>14</sup> 2001 U.S. Dist. LEXIS 20394. See also, *Medtronic Sofamor Danek, Inc. v. Michelson*, 229 F.R.D. 550 at 555 (2003) (recognizing split in authority but granting request to provide electronic versions of e-mail because it would contain evidence not available from hard copies).

<sup>15</sup> ETP has asserted that "[p]rices for monthly sales, and daily sales for that matter, change from one day to the next, and even within a day, and such changes can be substantial." ETP's October 9, 2007 Answer at 75.

34. The Commission finds that McGraw-Hill's suggestion that ETP obtain information from ICE, voice brokers and individual trading companies through the subpoena process is unreasonable. ETP has shown in its July 25, 2008 answer that data from public sources such as ICE represent only a small fraction of the sales reported by Platts.<sup>16</sup> Moreover, the Commission finds that requiring ETP to determine all voice brokers and trading companies operating during the relevant period and then to subpoena such entities would require extensive and burdensome discovery. The courts recognize that the reporter's privilege will not be abridged absent an attempt to obtain information from other reasonable sources.<sup>17</sup> The courts also recognize that "this does not mean, however, that a litigant must pursue an 'onerous, wide-ranging or ill-lighted' discovery path before seeking to obtain the information from a newsgatherer."<sup>18</sup>

35. Within fifteen days of the date of this order, McGraw-Hill is directed to provide ETP with the information requested by Items 1.5, 1.6, 1.7 and 1.10, and file a letter with the Commission in this docket specifying its compliance with this order and ETP's subpoena request.

The Commission orders:

(A) ETP's request for rehearing is granted in part as discussed above.

(B) Within fifteen days of the date of this order, McGraw-Hill is directed to provide ETP with the information requested by Items 1.5, 1.6, 1.7 and 1.10, and file a letter with the Commission in this docket specifying its compliance with this order and ETP's subpoena request.

By the Commission.

( S E A L )

Kimberly D. Bose,  
Secretary.

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<sup>16</sup> ETP's July 25 Answer at 8-9.

<sup>17</sup> *CFTC v. McGraw-Hill*, 507 F. Supp. 2d 45, 55 (D.D.C. 2007), *citing*, *Zerilli v. Smith*, 656 F.2d 705, 717 (D.C. Cir. 1981).

<sup>18</sup> *Id.*, *citing*, *Carey v. Hume*, 492 F.2d 631, 639 (D.C. Cir. 1974).